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No. _____

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1993

FRANK KELLY, MARIA KELLY, JUAN ANTONIO BRANDO, BERTA LASERNA, RAFAEL DAVID POLEO ISAVA, ELLIO CIOCCA, DANIEL PRADO FLORES, MAX GOMEZ, WILLIAM MACKAY, ANTONIA MACKAY, GONZALO BARQUERO, ABRAHAM STEFAN, OSVALDO CORDOVA, RUDY ZEPEDA, THOMAS BOVEE, RICARDO SUCRE, and AGROPECUARIA MILLON, C.A., a foreign corporation,

Petitioners,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a Delaware corporation,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States District Court for the Southern District of Florida enjoined Petitioners from proceeding with an arbitration of their state-law claims based on a determination that those claims were barred under the doctrine of *res judicata*, notwithstanding the existence of a pre-dispute arbitration agreement which expressly permitted Petitioners to split their claims, and the Court of Appeals for the Eleventh Circuit affirmed. The questions presented are:

1. Whether the common-law defense of *res judicata* is an exception to the otherwise absolute federal policy reflected in the Federal Arbitration Act forbidding federal courts from considering or deciding the merits of disputes which fall within the scope of a valid arbitration agreement?

2. Whether the court of appeals properly found that Petitioners' state-law claims were barred under *res judicata* as a matter of federal common law notwithstanding the existence of a written agreement between the parties which expressly permitted Petitioners to raise their federal and state claims in different forums?

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MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a Delaware corporation,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners* request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on June 29, 1993.

* The single corporate Petitioner has no parent companies or subsidiaries.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 985 F.2d 1067 (11th Cir. 1993). The opinion of the district court (Pet. App. B) is unreported.

GROUNDS FOR JURISDICTION

The opinion of the court of appeals was issued on March 15, 1993. Petitioners filed a timely petition for rehearing, *see* 11th Cir. Rule 35-6, which was denied on June 29, 1993. The court of appeals' order denying rehearing is set forth in the appendix to this petition (Pet. App. C). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The text of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, is set forth in the appendix to this petition (Pet. App. D).

STATEMENT OF THE CASE

Petitioners are investors who opened and maintained securities accounts with Respondent Merrill Lynch, Pierce Fenner & Smith, Inc. ("Merrill Lynch"), one of the country's largest retail brokerage firms. As a condition of opening each such account, Merrill Lynch required each

Petitioner to execute a customer agreement which contained an arbitration clause providing as follows (emphasis has been supplied):

> Except to the extent that controversies involving claims arising under the federal securities laws may be litigated, any controversy between us arising out of such option transactions or this agreement ***shall*** be settled by arbitration only before the National Association of Securities Dealers, Inc. or the New York Stock Exchange, or an Exchange located in the United States upon which listed option transactions are executed.

Like other courts of appeals, the Court of Appeals for the Eleventh Circuit has interpreted arbitration agreements containing similar or identical language as agreements which require the parties to arbitrate all claims other than claims arising under the federal securities laws, and permit the parties to litigate federal securities claims in separate judicial proceedings if either party chooses to do so. *See Blue Gray Corporations I and II v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 921 F.2d 267 (11th Cir. 1991).

Merrill Lynch invested Petitioners' funds in speculative and unsuitable investments, leading ultimately to a combined loss to Petitioners of more than $2,000,000. Alleging that Merrill Lynch had failed to disclose certain critical terms and conditions governing the trading in their accounts, Petitioners brought suit against Merrill Lynch in federal district court for the Southern District of Florida under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Securities and Exchange

Commission Rules 10b-5 and 10b-16 promulgated thereunder.[1] Petitioners honored their arbitration agreement with Merrill Lynch by including only federal securities claims in their federal complaint. Nevertheless, Merrill Lynch was aware from the outset that Petitioners intended to assert additional state-law claims in a separate arbitration proceeding.

After a period of discovery, Merrill Lynch obtained summary judgment on Petitioners' federal claims.[2] Within three weeks of that ruling, Petitioners formally initiated an arbitration proceeding before the National Association of Securities Dealers, Inc. ("NASD") by filing a Statement of Claim with the NASD. Nearly fourteen months later, after participating fully in the arbitration process, and on the eve of the scheduled commencement of the arbitration hearing, Merrill Lynch filed an "Emergency Motion for Preliminary Injunction" in the district court asking the court to enjoin Petitioners from proceeding with the arbitration. The basis for Merrill Lynch's motion was its contention that the court's prior summary judgment served to bar Petitioners' common-law claims under the doctrine of *res judicata*. Petitioners opposed Merrill Lynch's motion and filed a cross-motion to compel arbitration, arguing (*inter alia*) that Merrill Lynch's *res judicata* defense was a matter for the arbitrators to decide

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[1] The district court had subject-matter jurisdiction over Petitioners' federal claims under 15 U.S.C. § 78aa and 28 U.S.C. § 1331.

[2] The district court's grant of summary judgment was subsequently appealed to and affirmed without opinion by the court of appeals. *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 948 F.2d 1297 (11th Cir. 1991).

and that, in any case, the pre-dispute agreement which Merrill Lynch had required each Petitioner to sign deprived Merrill Lynch of any such defense. The district court, without benefit of oral argument or an evidentiary hearing, granted Merrill Lynch's motion and enjoined Petitioners from arbitrating their common-law claims.

In a brief *per curiam* opinion, the Court of Appeals for the Eleventh Circuit affirmed.

REASONS FOR GRANTING THE WRIT

Congress has enacted and this Court has thus far scrupulously enforced the rule that, when presented with a dispute falling within the scope of a valid and enforceable arbitration agreement, "a federal court may consider *only* issues relating to the making and performance of the agreement to arbitrate." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (emphasis supplied). With barely a nod to this paramount federal policy, the district court and the court of appeals have carved out a broad and unprecedented exception to this rule for matters involving the affirmative defense of claim preclusion. That rule deprives private parties of their contractual right to have such a defense decided by means of arbitration and disserves the policies underlying the Federal Arbitration Act.

The holdings of the courts below do as much violence to the federal common law of *res judicata* as they do to the Congressional policy in favor of enforcing privately negotiated arbitration agreements. It has never

previously been doubted that where, as here, "[t]he parties have agreed . . . that the plaintiff may split his claim," the ordinary rules of claim preclusion do not apply. Restatement (Second) of Judgments § 26(1)(a).[3] Yet the lower courts in this case have upheld a defense of *res judicata* in the face of a formal, written agreement which not only *permitted* but effectively *required* Petitioners to split their claims.

The court of appeals' decision in this case is unprecedented and in square conflict with holdings of this Court and other courts of appeals. Moreover, it involves issues going to the heart of two important bodies of federal law. We respectfully submit that this Court should review the decision of the court of appeals to settle these substantial and important legal questions.

I

The Court of Appeals Created an Unenacted Exception to the Federal Arbitration Act Which Merits Review by This Court

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides in relevant part that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." "By its terms, the Act

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[3] The text of section 26 of the Second Restatement of Judgments is set forth in the appendix to this petition (Pet. App. E).

leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original).

It is *undisputed* in this case that: (i) the parties executed written arbitration agreements falling within the scope of the Federal Arbitration Act; (ii) no grounds exist at law or in equity for the revocation of those agreements; and (iii) Merrill Lynch's asserted *res judicata* defense is among the issues which the parties agreed to arbitrate.[4] Under these circumstances, the district court was required both by the Act itself and by an unbroken line of federal interpretive authority to refer Merrill Lynch's defense to the NASD arbitrators, as Petitioners requested. In refusing to do so, the courts below committed fundamental and precedent-setting error.

The court of appeals itself acknowledged "the general rule . . . that, while federal courts can decide if an issue is arbitrable or not, they cannot reach the merits of arbitrable issues," but went on to find that "the better rule is that courts can decide res judicata." 985 F.2d at 1069.[5] Federal courts of appeals, however, are not free to

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[4] Indeed, Merrill Lynch recognized the arbitrability of this defense when it raised the defense in its answer to Petitioners' Statement of Claim before the NASD.

[5] The unreported district court decision cited by the court of appeals as supporting Petitioners' view squarely considered and rejected the position adopted by the courts below. None of the other cases cited by the court of appeals is on point. In *Miller*

" 'substitute [their] own views of economy and efficiency' for those of Congress" and this Court. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. at 217 (quoting *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638, 646 (7th Cir. 1981)). Nothing in the language or structure of the Act provides so much as a hint that matters of *res judicata* are an exception to the statutory policy requiring enforcement of private arbitration agreements. The Eleventh Circuit's ruling that the defense of *res judicata* (alone among the universe of possible defenses) is exempt from the prescriptions of the Arbitration Act ignores fifty years of federal precedent and contravenes this Court's teaching that questions of arbitrability should be addressed "with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem. Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

Brewing Co. v. Fort Worth Dist. Co., Inc., 781 F.2d 494 (5th Cir. 1986), the court found that the plaintiff had waived its right to arbitration by filing and pursuing a state-court lawsuit – an issue which the Federal Arbitration Act commits to the federal courts. The court's further discussion of *res judicata* was *dictum*. Similarly, in neither *New York State Ass'n for Retarded Chidren v. Carey*, 456 F. Supp. 85, 96 (E.D.N.Y. 1978), nor *City of Rochester v. AFSCME*, 54 A.D.2d 257, 388 N.Y.S.2d 489, 491 (App. Div. 1976), did the court actually usurp the arbitrator's authority to resolve a defense of *res judicata* to arbitrable claims. Both New York cases rely on and misinterpret *Rembrandt Indus., Inc. v. Hodges Int'l, Inc.*, 38 N.Y.2d 502, 381 N.Y.S.2d 451, 344 N.E.2d 383 (1976), which held only that the preclusive effect of a prior arbitration award was subject to judicial determination where the allegedly repetitive proceeding was brought in court. By that reasoning, Merrill Lynch's supposed defense should have been resolved by the arbitrators.

Moreover, this Court has made it clear that the federal policy which underlies the Act outweighs any federal interest in judicial economy. Prior to this Court's decision in *Byrd, supra,* the Eleventh Circuit and other federal courts had adopted the doctrine of "intertwining," under which those courts refused to order arbitration of arbitrable state-law claims asserted in conjunction with (then non-arbitrable)[6] federal securities claims, principally on the ground that permitting "bifurcated" judicial and arbitral proceedings would be uneconomical and inefficient. In *Byrd,* this Court rejected that doctrine and held that such considerations were insufficient to overcome the paramount federal policy favoring enforcement of valid arbitration agreements:

> The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute. . . . By compelling arbitration of state-law claims, a district court successfully protects the contractual rights of the parties and their rights under the Arbitration Act.

470 U.S. at 221. *See also id.* (the possibility of bifurcated proceedings " 'occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement' ") (quoting *Moses H.*

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[6] At the time the doctrine of "intertwining" arose, federal securities claims were considered to be non-arbitrable under *Wilko v. Swan,* 346 U.S. 427 (1953).

Cone Memorial Hospital, 460 U.S. at 20). Ignoring *Byrd*, the lower courts in this case have declined to enforce a valid arbitration agreement in an effort to avoid " 'piecemeal' litigation."

Under heretofore-established federal law, a federal court's "sole function is to determine whether arbitration should be commenced; [it] play[s] no part in determining the strength of claims and defenses presented." *City of Meridian, Miss. v. Algernon Blair, Inc.*, 721 F.2d 525, 529 (5th Cir. 1983). On that view, the strength of Merrill Lynch's *res judicata* defense was a matter reserved to the arbitrators. By hearing, considering and ultimately accepting Merrill Lynch's contention that it has a dispositive defense to Petitioners' arbitrable claims, the lower courts short-circuited the arbitration process and disregarded Petitioners' right to an arbitral determination of that defense. This Court should grant certiorari to preserve the primacy and vitality of its precedents on the obligation of federal courts to enforce valid, privately negotiated arbitration agreements.

II

In Upholding Merrill Lynch's *Res Judicata* Defense, the Court of Appeals Ignored the Effect of the Parties' Agreement and Did Violence to Accepted Principles of Claim Preclusion

Having determined (incorrectly) that the district court was empowered to rule on the merits of Merrill Lynch's asserted *res judicata* defense, the court of appeals went on to hold that Merrill Lynch was entitled to rely on

such a defense despite its prior written agreement permitting Petitioners to split their claims. In so ruling, the court of appeals reached an illogical result which penalizes litigants for honoring their contractual commitments and will only serve to make additional work for the federal courts. The lower courts' unprecedented construction of the federal law of *res judicata* conflicts with the holdings of other circuits and warrants this Court's review.[7]

The conceptual difficulties inherent in the Eleventh Circuit's ruling are reflected in its opinion. The court forthrightly acknowledged the crucial and dispositive fact on which our argument rests: "The [Merrill Lynch arbitration] agreement . . . *allowed plaintiffs to institute two suits based on the same events.*" 985 F.2d at 1070 (emphasis added).[8] The court's inquiry should have ended there. Its assertion a sentence later that "[n]othing shows that the

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[7] This Court has traditionally exercised close control over the development of the law of *res judicata* as applied in the federal courts. *See, e.g., Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *Montana v. United States*, 440 U.S. 147 (1979); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979); *Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation*, 402 U.S. 313 (1971).

[8] This concession was virtually compelled by the Eleventh Circuit's prior holding that the language of the Merrill Lynch arbitration agreement "clearly provide[s] for state law claims to be arbitrated, even those which arise out of the same transactions or occurrences as federal securities law claims." *Blue Gray Corporations I and II v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 921 F.2d 267, 271 (11th Cir. 1991).

parties understood . . . that the end of the first action would not preclude the start of the second" simply disregards the fact that a plaintiff can *always* "institute two suits based on the same events." The only legal impediment to such a course of action is the defense of *res judicata*. If the Merrill Lynch arbitration agreement "allowed [Petitioners] to institute two suits based on the same events" but at the same time permitted Merrill Lynch to defeat such an undertaking by invoking *res judicata* as a defense, then the parties' agreement in fact allowed Petitioners to do nothing they could not have done in the absence of such an agreement. By purporting to give content to the parties' claim-splitting agreement while at the same time depriving that agreement of any conceivable legal effect, the Eleventh Circuit's opinion can only bring confusion and uncertainty to the federal law of *res judicata*.

Aside from its internal inconsistency, the court of appeals' decision conflicts with longstanding principles of the law of prior adjudication. Courts and commentators have consistently recognized that the primary purpose underlying the doctrine of *res judicata* "is to protect the defendant from being harassed by repetitive actions based on the same claim. The rule is thus not applicable where the defendant consents, in express words or otherwise, to the splitting of the claim." Restatement (Second) of Judgments § 26, Comment a.[9] As the court of appeals

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[9] While it is true that the doctrine also serves to promote judicial economy, *e.g.*, *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979), the fact that a court will not raise issues of preclusion *sua sponte* demonstrates that the purpose of protecting litigants is primary and the purpose of protecting the courts

itself recognized, Merrill Lynch's arbitration agreement is an explicit written consent to the splitting of Petitioners' claims. The court of appeals' refusal to acknowledge the legal consequences of that consent is inconsistent with the Restatement and the countless judicial decisions that follow it.[10]

A recent decision of the Ninth Circuit, *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318 (9th Cir. 1992), reached the opposite result on facts less compelling than those present here. In *Clark*, the plaintiff violated an arbitration agreement similar to the agreement between Petitioners and Merrill Lynch by bringing both arbitrable state-law

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secondary. *See Technograph Printed Circuits, Ltd. v. United States*, 372 F.2d 969, 977 (Ct. Cl. 1967) ("the fact that a party can waive the application of collateral estoppel suggests that the needs of judicial administration are, at best, of subsidiary value"). Here, of course, Merrill Lynch voluntarily gave up the protection of *res judicata* when it signed and required Petitioners to sign an agreement providing for bifurcated proceedings. Moreover, the policy of conserving *judicial* resources has no application at all where the allegedly repetitive proceeding is an arbitration rather than a judicial proceeding, as it is here, since under those circumstances there will be only a single court proceeding in any case. *See Bristol Farmers Market & Auction Co. v. Arlen Realty & Dev. Corp.*, 589 F.2d 1214, 1221 (3d Cir. 1978) (compulsory counterclaim rule does not require defendant to assert arbitrable counterclaim in court: "Where the claim which would be barred if raised in a judicial action is instead pressed as a basis for arbitration, the goal of avoiding multiple litigation is still achieved").

[10] Merrill Lynch has never disputed that section 26 of the Second Restatement is an accurate statement of federal law. *See* Brief of Appellee at 33-34.

claims and non- arbitrable[11] federal securities claims in a single federal lawsuit. Pursuant to the parties' agreement, the district court referred the plaintiff's state-law claims to arbitration. After the arbitration had concluded, the defendants moved for summary judgment on the ground that the plaintiff's federal securities claims were barred by the preclusive effect of the prior arbitration proceeding. The district court denied the defendants' motion, and the Ninth Circuit affirmed. The appeals court rested its decision on the observation that, because the district court had retained jurisdiction over the plaintiff's federal securities claims, the arbitration panel lacked "subject-matter jurisdiction" over those claims and the plaintiff could not have submitted those claims to arbitration.[12] *Id.*

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[11] Like Petitioners' federal securities claims, the plaintiff's federal claims in *Clark* were non-arbitrable as a matter of contract. *See Clark*, 966 F.2d at 1321 n.2 ("There is no dispute here that Bear Stearns' agreement with Clark explicitly reserved from arbitration Clark's federal claims. We enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms").

[12] Although we agree with the result, we respectfully suggest that the Ninth Circuit's reasoning cannot withstand analysis. Arbitration panels do not possess "subject-matter jurisdiction," at least in the ordinary sense, and, although the plaintiff had no prior *obligation* to do so, there was in fact nothing to prevent her from raising all of her claims – federal and state – before the arbitration panel. In our view, the result reached in *Clark* is more appropriately grounded in the proposition that Bear, Stearns consented to bifurcated proceedings both when it executed the agreement and when it moved to compel arbitration. *See Nagle v. Franzese*, 1991 Westlaw 4736, *5 (S.D.N.Y. Jan. 18, 1991) (by moving to compel arbitration of some of plaintiff's claims, defendant consented to splitting of cause of action) (citing Restatement (Second) of Judgments § 26).

at 1321.[13]

Apart from an inconsequential difference in the order of proceedings, the only conceivable distinction between *Clark* and this case is that the plaintiff in *Clark* had to be ordered by a federal district court to comply with her prior agreement to arbitrate, while Petitioners in this case honored their arbitration agreement with Merrill Lynch voluntarily.[14] It is difficult to understand why that distinction should work to Petitioners' disadvantage. Indeed, the Ninth Circuit's reliance on the notion of "jurisdiction" to reach the result it did obscures the fact that this is an easier case than *Clark*. The relevance of

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[13] *See also Williams v. E.F. Hutton & Co., Inc.*, 753 F.2d 117, 119-20 (D.C. Cir. 1985) (prior arbitration did not preclude subsequent court action involving non-arbitrable claims); *Hybert v. Shearson Lehman/American Express Inc.*, 688 F. Supp. 320, 328-29 (N.D. Ill. 1988) (same); *Wing v. J.C. Bradford & Co.*, 678 F. Supp. 622, 627-29 (N.D. Miss. 1987) (same); *Artman v. Prudential-Bache Securities, Inc.*, 670 F. Supp. 769 (S.D. Ohio 1987) (same).

[14] The Eleventh Circuit attempts to distinguish *Clark* on the ground that the arbitration panel lacked "jurisdiction" over the plaintiff's federal claims in *Clark*, while the district court in this case would have had subject-matter jurisdiction to consider Petitioners' arbitrable claims. 985 F.2d at 1070 n.3. The court's distinction is flawed. As we have already noted, arbitration panels do not enjoy "jurisdiction" in the ordinary sense, and the plaintiff in *Clark* was in fact free to submit her federal claims to arbitration. Here, by contrast, Petitioners "could have asserted" their arbitrable claims in court only by breaching their contractual obligation to arbitrate. Neither the lower courts nor Merrill Lynch has ever suggested any reason that a plaintiff who is contractually precluded from raising certain claims in a particular forum should fare any worse than a plaintiff who is precluded from raising the same claims by the jurisdictional limitations of the forum.

jurisdiction to the *res judicata* inquiry lies in the generally accepted notion that a plaintiff who is unable to pursue certain claims or legal theories in his initial action is free to pursue those claims in a second proceeding.[15] Absence of jurisdiction is the most common reason for such an inability. In *Clark*, the Ninth Circuit's jurisdictional remarks notwithstanding, there was nothing which prevented the plaintiff from submitting both her federal securities claims and her state-law claims to the arbitration panel. Here, by contrast, Petitioners were precluded by contract from pursuing their state-law claims in federal court. Thus, if the plaintiff's claims were not barred by *res judicata* in *Clark*, the same result follows *a fortiori* here.

The rule adopted by the Eleventh Circuit will force litigants to breach valid arbitration agreements in order to save their state-law claims from a claim preclusion defense, and will force the federal courts to consider claims which both parties have previously agreed to resolve through arbitration. Under that rule, arbitration agreements like the one used by Merrill Lynch will be without practical effect, for securities plaintiffs will in fact have no choice but to bring all of their claims in a single forum or risk losing half of them. The Eleventh Circuit's rule has nothing apparent to commend it.

The decision of the court of appeals distorts accepted principles of the law of *res judicata* in order to save Merrill Lynch from bifurcated proceedings brought about

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[15] *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985); Restatement (Second) of Judgments § 26(1)(c).

solely because Petitioners complied with an arbitration agreement drafted and imposed on Petitioners by Merrill Lynch. Agreements like the one used by Merrill Lynch are common, within the securities industry and outside it, and their interpretation is a matter of great importance both to the development of the law of *res judicata* and to the efficient administration of the federal courts. Petitioners respectfully suggest that the Court should grant certiorari in order to resolve the important practical and doctrinal issues raised by the Eleventh Circuit's opinion.

CONCLUSION

The lower courts' decisions in this case simultaneously create a nonexistent exception to the Federal Arbitration Act and abolish a long-established exception to the common-law defense of *res judicata*. For the reasons stated, Petitioners respectfully contend that the petition for certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1993

FRANK KELLY, MARIA KELLY, JUAN ANTONIO BRANDO, BERTA LASERNA, RAFAEL DAVID POLEO ISAVA, ELLIO CIOCCA, DANIEL PRADO FLORES, MAX GOMEZ, WILLIAM MACKAY, ANTONIA MACKAY, GONZALO BARQUERO, ABRAHAM STEFAN, OSVALDO CORDOVA, RUDY ZEPEDA, THOMAS BOVEE, RICARDO SUCRE, and AGROPECUARIA MILLON, C.A., a foreign corporation,

Petitioners,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a Delaware corporation,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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APPENDIX A

Frank KELLY, Maria Kelly, Juan Antonio Brando, Berta Laserna, Rafael David Poleo Isava, Ellio Ciocca, Daniel Prado Flores, Max Gomez, William Mackay, Antonia Mackay, Gonzalo Barquero, Abraham Stefan, Osvaldo Cordova, Rudy Zepeda, Thomas Bovee, Ricardo Sucre and Agropecuaria Millon, C.A., Plaintiffs-Appellants,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a Delaware Corporation, Defendant-Appellee.

Nos. 91-5927, 91-6085.

United States Court of Appeals,
Eleventh Circuit.

March 15, 1993.

Thomas H. Seymour, Harry R. Schafer, Scott E. Perwin, Kenny, Nachwalter, Seymour, Arnold & Critchlow, P.A., Miami, FL, for plaintiffs-appellants.

Bennett Falk, Peter Buscemi, Morgan, Lewis & Bockius, Miami, FL, for defendant-appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, EDMONDSON, Circuit Judge, DYER, Senior Circuit Judge.

PER CURIAM:

This case asks whether the district court properly enjoined arbitration proceedings on the basis of res judicata. We affirm.

Plaintiffs had accounts with defendant Merrill Lynch. In 1987, plaintiffs filed a complaint based on SEC Rules 10b-5 and 10b-16 in district court.[1] After about two years of discovery, plaintiffs dismissed the 10b-16 claim. The court ultimately granted summary judgment to defendant on the remaining Rule 10b-5 claim. We affirmed. *Kelly v. Merrill Lynch*, 948 F.2d 1297 (1991).

Shortly after the district court granted defendant summary judgment, plaintiffs started arbitration of four state common law claims. The state claims alleged essentially the same conduct as the earlier litigation. Defendant moved the district court for a preliminary injunction against the arbitration. Plaintiffs' response included a motion to compel arbitration.

The district court granted the injunction. The district court concluded that 28 U.S.C. § 2283 gives federal courts the power to issue injunctions to protect their own judgments and that res judicata barred the arbitration claim.

I.

We must first decide whether the district court had the power to enjoin arbitration at all. The Anti-Injunction Act, 28 U.S.C. § 2283, says that federal courts can only

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[1] Each plaintiff had previously signed a written agreement with defendant that said:

> Except to the extent that controversies involving claims arising under the federal securities laws may be litigated, any controversy between us arising out of such option transactions or this agreement shall be settled by arbitration . . .

R2-151-12-13.

enjoin state court proceedings in certain cases, including where necessary to protect federal court judgments. Citing this provision, plaintiffs argue federal courts cannot enjoin arbitration because arbitration is not a state court proceeding. *Cf. McDonald v. West Branch,* 466 U.S. 284, 287-88, 104 S.Ct. 1799, 1801-02, 80 L.Ed.2d 302 (1984) (arbitration is not a state court proceeding under 28 U.S.C. § 1738).

The All-Writs Act, 28 U.S.C. § 1651, gives federal courts broad injunctive powers to protect their own judgments. *See, e.g., Kinnear-Weed Corp. v. Humble Oil & Refining Co.,* 441 F.2d 631, 637 (5th Cir.), *cert. denied,* 404 U.S. 941, 92 S.Ct. 285, 30 L.Ed.2d 255 (1971); *Gregis v. Edberg,* 645 F.Supp. 1153, 1157 (W.D.Pa. 1986), *aff'd,* 826 F.2d 1054 (3d Cir.1987). This power includes the authority to enjoin arbitration to prevent re-litigation. *See Tai Ping Insurance Co. v. M/V Warschau,* 731 F.2d 1141, 1144 (5th Cir.1984); *Miller Brewing Co. v. Fort Worth Distr. Co.,* 781 F.2d 494 (5th Cir.1986). We think the Anti-Injunction Act merely carves out an exception to the courts' broad injunctive powers, rather than authorizing an exclusive class of injunctions. The district court had the power to enter an injunction.

II.

The next question is whether the district court properly resolved the res judicata defense, rather than leaving the issue for the arbitrators to resolve. The Federal Arbitration Act, 9 U.S.C. § 2, expresses a policy in favor of arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765

(1983). Thus, the general rule for deciding which questions belong to the courts is that, while federal courts can decide if an issue is arbitrable or not, they cannot reach the merits of arbitrable issues. *E.g., Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 1241, 84 L.Ed.2d 158 (1985); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04, 87 S.Ct. 1801, 1805-06, 18 L.Ed.2d 1270 (1967). And doubts should be resolved in favor of arbitration, even if the result is piecemeal litigation. *See Moses H. Cone*, 460 U.S. at 20, 103 S.Ct. at 939; *Byrd*, 470 U.S. at 218-21, 105 S.Ct. at 1241-43.

Plaintiffs argue that res judicata must be left to arbitration because it is an affirmative defense that goes to the merits of their claims. *See Enterprise Ass'n v. Empire Mech., Inc.*, 1992 WL 84689 *2 (S.D.N.Y. April 9, 1992). We think the better rule is that courts can decide res judicata. *See Miller*, 781 F.2d at 501 (where state court dismissed plaintiff's claims with prejudice, and plaintiff then sought arbitration of claims that could have been brought in state suit, district court properly enjoined arbitration on the basis of res judicata); *see also New York State Ass'n for Retarded Children v. Carey*, 456 F.Supp. 85, 96 (E.D.N.Y.1978) (res judicata is exception to general rule requiring arbitration of issues going to the merits); *City of Rochester v. AFSCME*, 54 A.D.2d 257, 388 N.Y.S.2d 489, 491 (N.Y.App.Div.1976) (same). Courts should not have to stand by while parties re-assert claims that have already been resolved. *See Miller*, 781 F.2d at 497 n. 3 ("res judicata . . . [has] probably done more to prevent useless and wasteful litigation than arbitration ever could."). The issue is not just one of preventing the piecemeal litigation that occurs when parties simultaneously assert claims in

several forums, but of protecting prior judgments. Therefore, the district court properly reached the res judicata issue.

III.

We turn to the merits of the res judicata defense. A party can waive res judicata by consenting to split the claim into two suits. Restatement (Second) of Judgment § 26 cmt. a. The agreement here gave both parties the right to compel arbitration of state law claims, but not federal securities claims, even if both kinds of claims arose from the same events. *See Blue Gray Corps. I & II v. Merrill Lynch,* 921 F.2d 267, 271 (11th Cir.1991). Plaintiffs argue that because defendant essentially agreed to arbitrate some claims but litigate others, defendant waived or should be equitably estopped from asserting res judicata.

We cannot read the agreement as an express or implied waiver of res judicata. The agreement simply allowed plaintiffs to institute two suits based on the same events. Nothing shows that the parties understood – or that defendant led plaintiffs to believe – that the end of first action would not preclude the start of the second.[2] Therefore, defendant was entitled to assert res judicata.

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[2] This lack of misleading conduct on defendant's part distinguishes our case from *Calderon Rosado v. General Elec. Circuit Breakers,* 805 F.2d 1085, 1087 (1st Cir.1986). In *Calderon,* both parties agreed the plaintiff would dismiss her state case and proceed exclusively in federal court, only to have the defendant later plead res judicata in the second claim.

The other cases plaintiffs cite, *Kendall v. Avon Prods.,* 711 F.Supp. 1178, 1182 (S.D.N.Y.1989), and *Imperial Constr. Mgt. Corp. v. Laborers Int'l Local 96,* 729 F.Supp. 1199, 1205-07 (N.D.Ill.

Res judicata bars parties from relitigating issues that were or could have been raised in the first action. *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2428, 69 L.Ed.2d 103 (1981). Plaintiffs could have asserted the state claims before the district court, which would have had pendent or diversity jurisdiction over the claims.[3] The uncertainty of whether defendant would move to compel arbitration of the state claims did not justify two proceedings. *Cf. Harper Plastics v. Amoco Chemicals Corp.*, 657 F.2d 939, 946 (7th Cir.1981) (uncertainty of whether court would assert pendent jurisdiction did not

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1990), are also distinguishable. In those cases, the plaintiffs brought two actions simultaneously and the defendants did not object. It is one thing to say that when a defendant acquiesces in simultaneous suits, it impliedly agrees to let both suits proceed to resolution. It is another to say that by simply agreeing in advance of any controversy to litigate state and federal claims that might later arise in different forums, defendant agreed to let plaintiffs initiate one suit, lose, and try again in another forum.

[3] That plaintiffs could have brought all their claims in district court – put differently, the district court had the power to decide all of plaintiffs' claims – distinguishes this case from *Clark v. Bear Stearns & Co.*, 966 F.2d 1318 (9th Cir. 1992). In *Clark*, the plaintiff brought state and federal claims in a single federal suit. Based on a pre-existing arbitration agreement, the district court ordered arbitration of the state claims, but retained jurisdiction over the federal claims. The arbitration panel later dismissed "[a]ll claims."

The Ninth Circuit held that res judicata did not bar the plaintiff from litigating the remaining federal claims in district court. Because the district court retained jurisdiction over the federal claims, the plaintiff could not have asserted them in the arbitration proceeding. Therefore, the arbitral judgment had no effect on the federal claims. *Id.* at 1321.

justify multiple proceedings). The district court properly decided res judicata barred the arbitration.

We review the district court's injunction for abuse of discretion. *See Delta Air Lines, Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582, 587 (11th Cir.1983); *Tai Ping*, 731 F.2d at 1146. The district court was in the best position to decide whether the arbitration proceedings jeopardized its prior judgment. *See Delta*, 708 F.2d at 586. It did not abuse its discretion by concluding an injunction was necessary.[4]

AFFIRMED.

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[4] In a separate appeal, plaintiffs challenge the costs awarded to defendant. Because the district court neither abused nor failed to use its discretion in awarding costs to defendant, we affirm its award.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-2445-Civ-Nesbitt

FRANK KELLY, MARIA KELLY, et al.,

Plaintiffs,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Defendant.
_____/

ORDER ENJOINING ARBITRATION PROCEEDINGS

THIS CAUSE comes before the court upon the emergency motion of Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") for a preliminary injunction enjoining the Plaintiffs from proceeding in arbitration against Defendant. The Court has considered Defendant's emergency motion, filed October 4, 1991, Plaintiffs' motion to compel arbitration and memorandum in opposition to Defendants' emergency motion, filed October 10, 1991, and Defendant's reply memorandum, filed on October 11, 1991. After due consideration, in accordance with the Court's oral ruling on October 11, 1991, it is

ORDERED AND ADJUDGED that, for the reasons stated below, the motion for preliminary injunction is GRANTED and Plaintiffs are enjoined from proceeding to arbitration against the Defendant until Plaintiffs' appeal from this Court's Order Granting Summary Judgment

dated August 7, 1990, is resolved by the United States Court of Appeals for the Eleventh Circuit.

FACTS

In December 1987, Plaintiffs filed this action alleging violations of § 10(b) of the Securities and Exchange Act of 1934. Plaintiffs specifically alleged in the Complaint that Defendant Merrill Lynch had violated both Rule 10b-5 and Rule 10b-16, but Plaintiffs later voluntarily dismissed their claim under 10(b)(16) with prejudice. No other claims were brought before the Court, and on August 7, 1990, the Court granted summary judgment in favor of the Defendant on the 10(b)(5) claim.

Three weeks after entry of the Final Judgment, Plaintiffs filed a Statement of Claim with the arbitration board of the National Association of Securities Dealers, Inc. ("NASD"). The Amended Statement of Claim indicates that Plaintiffs are now proceeding against Merrill Lynch for their losses that were the subject of this Court's Order granting summary judgment dated August 17, 1990, under a different legal theory. Plaintiffs now argue that Plaintiffs' investments were unsuitable for them in light of their investment experience and that Merrill Lynch should have prevented Plaintiffs from making these investments. The Amended Statement of Claim contains four counts: breach of fiduciary duty, negligence and gross negligence, breach of contract, and negligent misrepresentations and omissions.

ANALYSIS

Defendant argues that this Court must enjoin Plaintiffs from proceeding before NASD because the arbitration is barred by the doctrine of *res judicata* and allowing arbitration to proceed would undermine the final judgment entered by this Court. Defendant argues that the Court has authority to enter this injunction pursuant to Federal Rules of Civil Procedure 65 and 28 U.S.C. §§ 1651 and 2283. Plaintiffs respond by arguing that whether their current claims are barred by the doctrine of *res judicata* is a matter for NASD to decide. Plaintiffs further assert that pursuant to the arbitration agreement, Plaintiffs could not have brought these claims in federal court, and therefore, Plaintiff should be allowed to arbitrate these claims at this time.

It is well established that a district court can issue an injunction under the Anti-Injunction Act, 28 U.S.C. § 2283, "to protect or effectuate its prior judgment. . . ." *Bank of Heflin v. Miles*, 621 F.2d 108, 112 (5th Cir. 1980). Thus, where Plaintiffs attempt to relitigate in another tribunal claims decided by a federal court, the court may properly enjoin those proceedings. *Id.* Under the doctrine of *res judicata*, the parties are prohibited from relitigating a final judgment "as to all claims that were raised or could have been raised [in the federal proceeding]." *Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F.2d 494, 498 (5th Cir. 1986); *see also Woods Exploration & Producing Company v. Aluminum Company of America*, 438 F.2d 1286, 1315 (5th Cir. 1971) ("*res judicata* would be applicable if plaintiffs were afforded an opportunity to allege the state grounds which constituted the same cause of action"). The prohibition on relitigation includes those state claims

that could have been brought in federal court under the doctrine of pendent jurisdiction, *Woods*, 438 F.2d at 1315, that is, claims which arise out of the same "operative nucleus of fact." *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 632 (11th Cir. 1984).

A review of the Amended Statement of Claim filed with NASD indicates that Plaintiffs' claims arise from the same "operative nucleus of fact" as their 10(b)(5) claim, which was previously adjudicated by this Court. Moreover, Plaintiffs admit that as "a technical matter" the Court would have enjoyed subject matter jurisdiction over the claims they seek to arbitrate.

The Court finds that under the circumstances of this case, the Court has the authority to enter an injunction to protect its final judgment. Allowing NASD to determine whether the claims are barred by the doctrine of *res judicata* clearly would fail to protect the district court's final judgment. Rather than waiting until this Court decided the merits of their 10(b)(5) claim to raise these additional claims, the Plaintiffs should have brought the pendent claims in the federal action in December of 1987 – regardless of whether Merrill Lynch could have compelled arbitration of these claims. If Plaintiffs had brought all of their claims at that time, this Court could have determined the best manner to adjudicate all of Plaintiffs' claims without the possibility of conflicting decision by various tribunals on the same issues. The Court has determined, however, that it will only enter a preliminary injunction at this stage of the proceedings because Plaintiffs have appealed the final judgment to the Eleventh Circuit. If the judgment is reversed on appeal, it

has no *res judicata* effect. *Woods*, 438 F.2d at 1316. Accordingly, it is further,

ORDERED AND ADJUDGED that the Plaintiffs shall advise the Court when the Eleventh Circuit has disposed of the appeal in this case so that the Court may schedule a hearing on the status of the injunction entered by this Order.

DONE and ORDERED in chambers, Miami, Florida this 17 day of October 1991.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES
DISTRICT COURT

cc: counsel of record

APPENDIX C
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5927, 91-6085

FRANK KELLY, MARIA KELLY, JUAN ANTONIO BRANDO, BERTA LASERNA, RAFAEL DAVID POLEO ISAVA, ELLIO CIOCCA, DANIEL PRADO FLORES, MAX GOMEZ, WILLIAM MACKAY, ANTONIA MACKAY, GONZALO BARQUERO, ABRAHAM STEFAN, OSVALDO CORDOVA, RUDY ZEPEDA, THOMAS BOVEE, RICARDO SUCRE, AGROPECUARIA MILLON, C.A.,

Plaintiffs-Appellants,

versus

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a Delaware Corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Filed June 29, 1993)

Before: TJOFLAT, Chief Judge, EDMONDSON, Circuit Judge and DYER, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

APPENDIX D

ARBITRATION

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

July 30, 1947, c. 392, 61 Stat. 670.

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§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out

of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670.

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§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

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§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of

application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.

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§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been

specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

July 30, 1947, c. 392, 61 Stat. 671.

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§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

July 30, 1947, c. 392, 61 Stat. 671.

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§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators,

or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

July 30, 1947, c. 392, 61 Stat. 672; Oct. 31, 1951, c. 655, § 14, 65 Stat. 715.

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§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

July 30, 1947, c. 392, 61 Stat. 672.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

July 30, 1947, c. 392, 61 Stat. 672.

§ 10. Same; vacation; grounds; rehearing

(a) If any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(As amended Nov. 15, 1990, Pub.L. 101-552, § 5, 104 Stat. 2745; Aug. 26, 1992, Pub.L. 102-354, § 5(b)(4), 106 Stat. 946.)

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§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration –

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

July 30, 1947, c. 392, 61 Stat. 673.

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§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purpose of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

July 30, 1947, c. 392, 61 Stat. 673.

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§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the some force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

July 30, 1947, c. 392, 61 Stat. 673.

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§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

July 30, 1947, c. 392, 61 Stat. 673.

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§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

(Added Pub.L. 100-669, § 1, Nov. 16, 1988, 102 Stat. 3969.)

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§ 16. Appeals

(a) An appeal may be taken from –

(1) an order –

(A) refusing a stay of an action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) and interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order –

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(Added Pub.L. 100-702, Title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4671, § 15, renumbered Pub.L. 101-650, Title III, § 325(a)(1), Dec. 1, 1990, Stat. 5120.)

APPENDIX E

§ 26. Exceptions to the General Rule Concerning Splitting

(1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

(a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or

(b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; or

(c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief; or

(d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim; or

(e) For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue

once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course; or

(f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

(2) In any case described in (f) of Subsection (1), the plaintiff is required to follow the procedure set forth in §§ 78-82.